

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS JOHN BOUKAMP,

Defendant-Appellant.

UNPUBLISHED

June 12, 2007

No. 267375

Ingham Circuit Court

LC No. 05-000785-FH

Before: Talbot, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of two counts of fourth-degree criminal sexual conduct (CSC IV). MCL 750.520e(1)(a). We affirm.

Defendant first asserts misconduct by the prosecutor in permitting a nurse to offer hearsay testimony repeating allegations made by the victim of sexually oriented behavior engaged in by defendant. Because this issue is not properly preserved, we review for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Contrary to defendant's assertion, the challenged testimony was admissible pursuant to MRE 803(4) as a hearsay exception for statements made for the purpose of medical treatment or diagnosis. As such, the prosecutor's elicitation of the evidence did not constitute prosecutorial misconduct. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). In addition, defendant contends that the nurse's testimony was unfairly prejudicial. MRE 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." A danger of unfair prejudice to defendant is not enough to exclude evidence. Rather a defendant must show that the probative value is substantially outweighed by the danger of unfair prejudice. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Because the evidence served to substantiate that defendant committed the charged offenses, its potential for undue prejudice did not outweigh its probative value, especially given the fact that the evidence was merely cumulative to the victim's testimony.

Defendant next argues prosecutorial misconduct based on the elicitation of irrelevant and unduly prejudicial other acts evidence and the failure to provide notice as required by MRE 404(b)(2). Because this issue is not properly preserved, our review is for plain error that affected substantial rights. *People v Dobek*, 274 Mich App 58, 87; ___ NW2d ___ (2007).

The challenged evidence consisted of testimony regarding other acts of a sexual nature, which involved defendant and the victim showing each other intimate parts of their bodies and defendant touching private areas of the victim's body. Our Supreme Court has previously ruled that "the probative value [of the other acts evidence] outweighs the disadvantage where the crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense." *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973). Because this testimony demonstrated prior familiarity and acts of sexually oriented conduct by defendant with the victim, admission of the evidence did not constitute plain error.

Defendant further argues that the prosecutor failed to provide pretrial notice of the other acts evidence as required by MRE 404(b)(2). However, such failure does not warrant reversal where the evidence was substantively admissible and there is no indication that defendant would have proceeded differently with proper notice. *Dobek, supra* at 87-88; *People v Hawkins*, 245 Mich App 439, 455-456; 628 NW2d 105 (2001).

Defendant next argues that the prosecutor engaged in misconduct by asserting during closing argument that defendant lied before and during trial. "[A] prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief, and is not required to state inferences and conclusions in the blandest possible terms." *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996) (citations omitted). Contrary to defendant's claim, the prosecutor did not assert any special knowledge regarding witness credibility. Rather, citing to the evidence, the prosecutor permissibly argued the lack of any motive for the victim to falsely accuse defendant and that defendant's explanation of events was not credible. *Id.*

Defendant finally contends counsel was ineffective because of the failure to object to the alleged instances of prosecutorial misconduct detailed *supra*. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that but for counsel's errors, the outcome of the proceeding would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "Defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). In light of our conclusion that prosecutorial misconduct did not occur, trial counsel was not ineffective for "failing to advocate a meritless position." *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). In addition, defendant implies that the cumulative effect of the alleged errors denied him a fair trial. In determining whether a criminal conviction should be reversed because of the effect of cumulative errors, "only actual errors are aggregated to determine their cumulative effect." *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999) (citation omitted). Because defendant has not shown that any error occurred, the cumulative error doctrine is not applicable.

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter